

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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In the Matter of

Order on Reconsideration of July 10, 1997 (FCC 97-246)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

DOCKET FILE COPY ORIGINAL CC Docket No. 96-45

PETITION FOR CLARIFICATION AND RECONSIDERATION
OF THE EDUCATION AND LIBRARY NETWORKS
COALITION (EDLINC)

**ON THE COMMISSION'S "ORDER ON RECONSIDERATION OF
RULEMAKING AND NOTICE OF JULY 10, 1997"**

The Commission's July 10, 1997 Order on Reconsideration of the Universal Service Order has disadvantaged many schools and libraries by nullifying their eligibility for discounts on services obtained through multi-year contracts signed after November 8, 1996.

The problem addressed here is created in paragraph 2 of the Introduction to the subject Order by the ending clause of the first sentence which is -- **“..., but only if that contract covers only services provided to the school or library before December 31, 1998.”** And, it can be corrected by eliminating this problematic clause so that the first sentence would read as follows:

“2. With respect to schools and libraries, we conclude that an eligible school or library is not required to comply with the competitive bidding requirement for any contract for telecommunications services that it signs after November 8, 1996 and before the competitive bidding system is operational.”

The Commission's Order on Reconsideration amended the universal service order's requirements for eligibility for discounts for existing services. Specifically, the Commission clarified that contracts signed after November 8, 1996 (the date of the Joint Board recommendation to the

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Commission) and before the adoption of the procurement web site later in 1997 are eligible for discounts, **but only if contracts for those services terminate no later than 12/31/98.**

The members represented in this Petition are aware of many schools and libraries which exercised good faith business decisions between the period of November 8, 1996 and the current day in procuring services for their educational purposes. They had no reason to believe from the Joint Board's recommendation last November that such business decisions would result in discount penalties for those decisions. Even after the Commission's order on May 8, 1997, schools and libraries (and service providers) had no reason to suspect that normal business activities would disqualify schools for discounts on newly-acquired or reacquired services. School and library boards typically make decisions in early spring in preparation for annual budget cycles. Most went about their business while adhering to state and local procurement laws and competitively bid for needed service requirements. Unfortunately, the language of the Order on Reconsideration now jeopardizes discounts for those services in numerous cases.

The Joint Board's Recommended Decision led schools and libraries to believe that contracts in existence prior to the adoption of the rules would be eligible for discounts. In paragraph 572 of the Recommended Decision, the Joint Board addressed the issue of discounts on existing services:

"...If the Commission permits schools and libraries to use the best negotiated contract rate for which they can bargain in the market as the pre-discount price to which a discount would apply, it would seem reasonable that such discount would also apply to contracts negotiated prior to the adoption of the rules under section 254(h). In both cases, schools and libraries with budgetary constraints have strong incentives to secure the lowest rates that they can as the pre-discount price, and the proposed discount methodology would apply a discount on that pre-discount rate. We recommend that the Commission not require any schools or libraries that had secured a low price on service to relinquish that rate simply to secure a slightly lower price produced by including a large amount of federal support....."

This paragraph certainly lends some degree of comfort to schools, libraries and vendors that existing contracts should be and would be eligible for discounts. While the language was but a recommendation at that time, there was certainly no cause for a school to reconsider its technology or communications plans and needs and put procurement activities on hold. Nor would the Joint Board have likely wanted schools or libraries to halt procurements until a final order was reached and the new universal service discount program is implemented.

On May 8, 1997, the Commission entered its universal service order under docket 97-157. In paragraph 545, the order states:

"...We agree with the recommendation of the Joint Board and a number of commenters that we should permit schools and libraries to apply the relevant discounts we adopt in this order to contracts that they negotiated prior to the Joint Board's Recommended Decision for services that will be delivered and used after the effective date of our rules.....While we will not require schools or libraries to breach existing contracts to become eligible for discounts, this exemption from our competitive bidding requirements shall not apply to voluntary extensions of existing contracts."

This paragraph introduces the problem that is addressed in this petition. The Commission has determined that 1.) it agrees with the above cited recommendation of the Joint Board; and, 2.) it should permit discounts on existing contracts; but 3.) it limits those discounts to contracts signed prior to November 8, 1996. The paragraph is silent on what status should be afforded to contracts signed after November 8 and before implementation of the new universal service discount program.

Many parties spoke to the Commission on the record asking for clarification of the status of contracts signed after November 8, 1996 and before the new program is implemented. Until the Order on Reconsideration was issued on July 10, no school, library or service provider had reason to believe that the intent and spirit of the Joint Board and Commission was anything other than to

provide discounts on “pre-existing contracts”. In the Joint Board’s Recommended Decision, the Board explained that strong incentives exist for schools and libraries to obtain the lowest possible pre-discount price. For schools, libraries and service providers, the normal process for procuring services at lowest possible prices continued after November 8, 1996 and until this very day. Indeed, most schools and libraries that have entered into contracts after November 8, 1996 are even now most likely unaware that they may not be eligible for discounts on services received under these contracts after January 1, 1998.

Schools and Libraries have had and will have many reasons to procure contracts for services after November 8, 1996 and before the web site becomes operational for which contract dates will extend beyond 12/31/98. There are many reasons why schools or libraries, absent the knowledge of the Commission's July 10, 1997 Order on Reconsideration, may have entered into contracts which will expire after 12/31/98.

In order to secure the lowest possible pre-discount price, schools and libraries will take advantage of amortization of a service provider's capital investment requirements over a number of years. Moreover, schools and libraries are also not inclined to rebid all services each and every year regardless of capital intensity-- the churn would be prohibitive and require much in the way of human capital. As a result, they take advantage of the better price performance that multi-year contracts can afford them. Examples of situations that lead to multi-year contracts include:

- **transport facilities for distance learning applications.** By amortizing technologies such as fiber over three or more year periods, the annual cost for services is made more affordable for schools and libraries. Distance learning curriculum development

is very complex, time consuming, and often predicated upon instructional support systems that must be available for several years.

- **expiration of existing contracts for services such as large voice systems or wide area networks.** If contracts expired during this time period, it is unreasonable to expect that schools or libraries would not rebid services or extend existing contracts. Most multi-year contracts have an average four-year life cycle; and, it is reasonable to assume that as many as 25% of all school and library contracts will have expired between November 8, 1996 and January 1, 1998. This could include multiple contracts for as many as two to three thousand school districts (over 10,000 schools) and over 1,000 libraries.

- **development of state networks and other consortia.** Many states are in the process of building state networks to link all schools and libraries. Obviously, all such major network procurements must be part of competitive bidding process. Such capital investments are also typically amortized through the use of multi-year contracts. Many existing and new telecommunication service consortia are also making similar procurement decisions on behalf of schools and libraries.

- **advantaging existing state-adopted initiatives.** Many states are in the midst of offering incentives for schools and libraries to access networks using fiber or other technologies through state-adopted legislative or other incentive plans. Again, these initiatives typically involve multi-year contracts. No state should be expected to put their technology plans on hold while waiting for the Commission to

determine rules for the new universal service discount program.

- **federal programs and initiatives such as the Challenge grants, TILAP, Goals 2000 et al, actually require multi-year efforts (i.e., typically for 5 years) and require contracts for supporting systems that can be depended upon for the life of the project (i.e., multi-year contracts.).**
- **resourcing of new schools or library facilities.** For a new school or library, the communications requirements may have been subsumed in the bond issues which appropriated funds to support multi-year projects with contracts extending over the life of the project.

By nullifying discounts on all contracts with termination dates beyond 12/31/98, many schools and libraries are disadvantaged. The selection of 12/31/98 as the required termination date for contracts eligible for universal service discounts is a retroactive rule applied to schools or libraries who found it necessary to make critical procurement decisions in their normal course of business. Most assuredly they could never have foreseen on November 8, 1996 that the Commission would later introduce a ruling nullifying discounts on their multi-year contracts.. Even on May 8, most could not have reasonably concluded that a future Order of the Commission would penalize their routine procurement decisions. And, even after the July 10 Order on Reconsideration, there hasn't been widespread outreach to advise schools and libraries that their current actions may jeopardize their eligibility for universal service discounts; and that their normal procurement activities should be halted indefinitely pending implementation of the new universal service discount program.

Unfortunately, the schools and libraries are the parties that are harmed by this decision. Once a school or library learns that its good faith activities during this time period will result in a loss of discounts, it must consider how to void those activities in order to take advantage of universal fund discounts. Such activities will likely raise the following issues:

- There more than likely will be huge unanticipated costs in the form of contract termination fees. In order to qualify for discounts, the school or library will have to *terminate the new contract and suffer termination fees that could be as high as 70% of the remaining contract value.*
- There would be a human labor cost of reinitiating identical processes and procedures to rebid the same RFP after the web site becomes operational in order to be in compliance with the Commission's retroactive rules.
- There may be significant community reaction from parents or special interest groups surrounding increased costs (legal fees, termination fees, labor, etc.) for reinitiating bidding activities. Such activities may serve to embarrass school officials or board members unnecessarily or cause unwise or uneconomic decisions to be made.
- There may be delayed installation of needed services. Contract terminations could result in unnecessary litigation and school and library board decisions which might delay action on any subsequent procurement. There is also a strong likelihood that installation of needed services for the benefit of students will be delayed.

- Contracts may have to be secured for very short interim time periods which could result in higher prices from providers and unwanted procurement decisions by schools and libraries.
- Curriculum and course implementation plans may be delayed until requisite supporting services are procured.

Faced with these obstacles, many schools and libraries may not be able to participate in the new universal service discount program until their current contracts expire. Surely, this not what the Commission intended when it issued its July 10, 1997 Order on Reconsideration.

Additionally, the Order on Reconsideration also complicates the Fund Administrator's review of school and library discount applications. The Administrator will need to know under what conditions and when all existing contracts were signed and with what termination dates in order to determine which of them are eligible for universal service discounts. This places an additional administrative burden and expense on the process.

RECOMMENDATION: The Order on Reconsideration should be changed to permit discounts on all contracts in existence (i.e., all "pre-existing contracts") up to the date the Fund Administrator's web site becomes fully operationally as described in the Order on Reconsideration.

As cited above, the Joint Board had suggested that discounts should apply to contracts negotiated prior to the adoption of rules under section 254(h). The Joint Board wisely considered that schools and libraries already have strong incentives to secure the lowest rates they can obtain as

a pre-discount price. Service providers have the same incentive and must amortize capital investments over reasonable contract periods in order to provide the lowest possible service rates. The best deal schools and libraries can arrange will, in most if not all cases, result in multi-year contracts. For these reasons, schools and libraries should not be penalized for making good business decisions on behalf of their constituents. The Commission should issue another Order or clarify its intent by amending its own Order on Reconsideration of July 10, 1997 to permit discounts on all contracts signed prior to the development and full implementation of the new universal services procurement web site.

At a minimum, the Commission should reconsider its decision to make retroactive rules that nullify discounts on contracts signed after November 8, 1996 and before the July 10 Reconsideration becomes effective (i.e., 30 days after its publication in the Federal Register). As a minimal alternative, we recommend that all "pre-existing contracts" -- defined to include contracts signed after November 8, 1996 and before the Commission's July 10, 1997 Order on Reconsideration becomes effective -- be eligible for discounts. This timing will allow outreach to schools, libraries and service providers to advise them of penalties that might apply to the business decisions they are currently making.

Respectfully submitted for the
Education and Library Networks Coalition (EDLINC)
by:

A handwritten signature in black ink, appearing to read "Dennis L. Bybee", with a stylized flourish at the end.

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